

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**

STEVEN BUSBY,)	
)	
Petitioner,)	
)	
vs.)	SBA Case No. 2022-0253
)	
STATE BOARD OF ADMINISTRATION,)	
)	
Respondent.)	
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FINAL ORDER

On August 2, 2022, the Presiding Officer submitted her Recommended Order to the State Board of Administration in this proceeding. The Recommended Order indicates that copies were served upon the *pro se* Petitioner, Steven Busby, and upon counsel for the Respondent. No exceptions to the Recommended Order, which were due by August 17, 2022, were filed by either party. A copy of the Recommended Order is attached hereto as Exhibit A. The matter is now pending before the Chief of Defined Contribution Programs for final agency action.

ORDERED

The Recommended Order (Exhibit A) is hereby adopted in its entirety. The Petitioner’s request that he be allowed to switch from the Florida Retirement System (“FRS”) Investment Plan to the FRS Pension Plan without having to utilize his second election and to pay any required buy-in amount hereby is denied. Petitioner claimed that, due to incorrect information provided by his employer, he was mistakenly under the impression that he did not affirmatively have to make a plan election in order to be in the FRS Pension Plan. However, even if Petitioner had been provided erroneous information by his employer, Section 121.021(10), Florida Statutes, specifically provides that

employers are not agents of the SBA and that, therefore, the SBA by law is not responsible for any erroneous information that may have been provided by Petitioner's employer. Petitioner was provided with numerous communications from the SBA reminding him of the necessity of making a plan election if he wanted to be in the FRS Pension Plan. Since Petitioner failed to make a plan election before his plan choice election period ended on April 29, 2022, he defaulted to the FRS Investment Plan as required by law. Petitioner is not entitled to the relief requested.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the State Board of Administration in the Office of the General Counsel, State Board of Administration, 1801 Hermitage Boulevard, Suite 100, Tallahassee, Florida, 32308, and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days from the date the Final Order is filed with the Clerk of the State Board of Administration.

DONE AND ORDERED this 15 day of November, 2022, in Tallahassee, Florida.

**STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION**



Daniel Beard
Chief of Defined Contribution Programs
State Board of Administration
1801 Hermitage Boulevard, Suite 100
Tallahassee, Florida 32308
(850) 488-4406

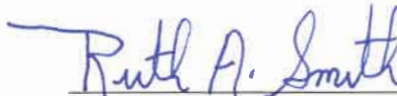
FILED ON THIS DATE PURSUANT TO SECTION 120.52, FLORIDA STATUTES WITH THE DESIGNATED CLERK OF THE STATE BOARD OF ADMINISTRATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.



Tina Joanos
Agency Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order was sent to Steven Busby, *pro se*, both by email transmission to sblighting1@hotmail.com and by U.P.S. to 2887 North Highway 81, Ponce de Leon, Florida 32455; and by email transmission to Deborah Minnis, Esq. (dminnis@ausley.com) and Ruth Vafek (rvafek@ausley.com) and jmcvaney@ausley.com, Ausley & McMullen, P.A., 123 South Calhoun Street, P.O. Box 391, Tallahassee, Florida 32301, this 15 day of November, 2022.



Ruth A. Smith
Assistant General Counsel
State Board of Administration of Florida
1801 Hermitage Boulevard
Suite 100
Tallahassee, FL 32308

STATE OF FLORIDA
STATE BOARD OF ADMINISTRATION

STEVEN BUSBY,

Petitioner,

vs.

CASE NO. 2022-0253

STATE BOARD OF ADMINISTRATION,

Respondent.

RECOMMENDED ORDER

This case was heard in an informal proceeding pursuant to Section 120.57(2), Florida Statutes, on August 2, 2022, with all parties appearing telephonically before the undersigned presiding officer for the State of Florida, State Board of Administration (SBA). The appearances were as follows:

APPEARANCES

For Petitioner: Steven Busby, *pro se*

For Respondent: Deborah S. Minnis
Ausley McMullen, P.A.
123 South Calhoun Street
Tallahassee, FL 32301

STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner is entitled to enroll in the Florida Retirement System ("FRS") Pension Plan without using his second election.

EXHIBIT A

PRELIMINARY STATEMENT

All parties attended the hearing by telephone. Petitioner testified on his own behalf and presented no other witnesses. Respondent did not present the testimony of any witnesses. Respondent's Exhibits R-1 through R-4 were admitted into evidence without objection. Petitioner's Exhibit 1 was admitted into evidence without objection.

A transcript of the hearing was made, filed with the Agency, and provided to the parties on August 16, 2022. The parties were invited to submit proposed recommended orders within thirty days after the transcript was filed. The following recommendation is based upon the undersigned's consideration of the complete record in this case and all materials submitted by the parties.

UNDISPUTED MATERIAL FACTS

1. The Petitioner was originally employed in an FRS-eligible position with the Holmes County Sheriff's Office from October 1993 – August 1994. He was subsequently employed with the State of Florida Department of Corrections from May 1996 – March 2002.

2. Since implementation of the FRS Investment Plan in July 2002, employees participating in FRS have had the opportunity to elect to participate in either the Pension Plan or the Investment Plan. A member's plan choice following initial employment with an FRS employer, is referred to as an "initial election." Petitioner left his employment with the Department of Corrections in March of 2002 - prior to the July enactment of the Investment Plan. Since the only option available to Petitioner during his previous periods of FRS employment was the Pension Plan, Petitioner did not make an "initial election" during those periods of employment.

3. Petitioner began a third period of employment in an FRS eligible position when he was hired by Walton County, Florida on August 2, 2021. Because there was no initial election

on record for Petitioner, the statutes and rules governing the initial election process applied to the Petitioner's employment with Walton County. In accordance with Section 121.4501(4)(b)1, Florida Statutes, Petitioner was provided an initial election period.

4. Petitioner was given a deadline of April 29, 2022 by FRS, to make an initial election between the Pension Plan and the Investment Plan.

5. A Benefit Comparison Statement with the April 29, 2022, Choice Deadline was mailed to Petitioner on September 21, 2021 at the address on file for Petitioner, which matched the address used by Petitioner on his Petition for Hearing in this matter. Petitioner was also sent reminder letters to the address on January 10, 2022, and April 11, 2022, reminding him about the need to make an election before the April 29, 2022 deadline.

6. As a courtesy Petitioner was sent reminders by email to the email address in his file on November 22, 2021, December 15, 2021, February 7, 2022, March 1, 2022, and April 28, 2022.

7. The Benefit Comparison Statement provided Petitioner with information on the various ways in which he could contact FRS to obtain additional information and included his PIN. He could choose one or more of the following options:

- i. Using the 1st Election Choice Service on [MyFRS.com](https://www.myfrs.com);
- ii. Calling the toll-free MyFRS Guidance Line at 1-866-446-9377, Option 4;
or
- iii. Using the ELE-1-EZ Retirement Plan Enrollment Form (online or hardcopy) or ELE-1 General Retirement Plan Enrollment Form (hardcopy) available on [MyFRS.com](https://www.myfrs.com).

Exhibit R-1, 005.

There was also educational material available to Petitioner, including:

- i. Toll-free access to the MyFRS Financial Guidance Line;
- ii. Access to public information on MyFRS.com (including detailed information on the choice process, copies of all publications provided in the Choice Kit and FAQ's);
- iii. Employee workshops; and
- iv. Employer Human Resources offices, which were afforded workshop training on the choice, supplied with printed materials, and received email updates on the choice.

Exhibit R-1, 005.

8. The Plan Choice Administrator has no record of receiving an initial choice form from the Petitioner on or before the April 29, 2022, deadline. Pursuant to Section 121.4501(4)(b)3a., Florida Statutes, Petitioner was deemed to have made an initial election, by default, to participate in the Investment Plan. Petitioner has not utilized his second election and it remains available to him.

9. According to Petitioner, he was not aware the default plan under FRS was the Investment Plan and he did not know he was required to affirmatively elect to participate in the Pension Plan. He asserts that he was never provided an option to choose between plans and it was his understanding that he would automatically be placed in the Pension Plan.

10. Petitioner further claims that he did not receive the notices sent by the U.S. Postal Service or any of the emails referred to by Respondent. Based on the testimony at the hearing, it appears Petitioner's current email address was not on file with FRS at the time. The email address on file was actually an email address which had previously belonged to Petitioner's wife but was

no longer active. As a result, none of the emails reminding Petitioner of the choice period reached Petitioner. There does not appear to be any reason Petitioner did not receive the notices sent to his home address, which is a valid postal address for Petitioner.

11. Petitioner blames the human resources department at his current employer for not providing the information he would have needed to make a plan election, and for failing to update his contact information with FRS.

12. Petitioner also argued that language in an FRS "Employment Certification Form" he was provided influenced his belief that he would automatically be placed in the Pension Plan. The language relied on by Petitioner states as follows:

If you are not retired and you earned FRS service after certain periods since 2002 (depending on your employer) you will be enrolled in the FRS retirement plan you were enrolled in when you terminated FRS-covered employment.

13. According to Petitioner this language would require that he be placed back in the Pension Plan, which was the plan in which he participated during his prior employment, which ended in March of 2002. At the hearing, Petitioner paraphrased the language, as stating, "if you return to an FRS position ... you will be put back into either the pension or the investment; wherever you were when you left."

14. I find nothing in the language Petitioner could reasonably rely on in support of his belief that he would be automatically enrolled in the Pension Plan. While the statement in the FRS Employment Certification Form may be inartful, Petitioner's claim of reliance on the language, absent additional information, is not credible. All that can reasonably be determined from the statement is that some individuals who earned FRS service "after certain periods since 2002" will be placed back in the plan they participated in before they "terminated FRS-covered employment." This statement is even further qualified by language indicating the exception may or may not apply "depending on your employer." Given that Petitioner's prior employment

terminated early in 2002, he was clearly on notice the language might very well be inapplicable to his circumstances. At the very least, the language should have raised questions sufficient to compel Petitioner to contact FRS for clarification. There is no evidence Petitioner contacted FRS during his initial election period. It is not reasonable to believe one could view the Employment Certification Form language as sufficiently conclusive to rely on, under the circumstances.

15. Respondent argued, in part, that the form is “for individuals who are returning to employment after retirement.” Although not determinative here, it should be pointed out that Respondent’s characterization of the Form is not accurate. The form contains information that applies to *any* individual returning to FRS-covered employment who has previously earned credited service with an FRS employer. While some portions of the form apply to retirees, others apply to members who had only terminated employment prior to reaching retirement status. Indeed, the language at issue here begins, “If you are not retired and you earned FRS service...”

CONCLUSIONS OF LAW

12. Because Petitioner’s first two periods of FRS eligible employment ended prior to the enactment of the Investment Plan, he had not been provided an initial election period prior to his employment with Walton County in 2021. This has significant implications when determining which provision of Chapter 121 governs Petitioner’s plan election.

13. Section 121.4501(4)(b)1, Florida Statutes, governs the plan election of any employee who becomes eligible to participate in the investment plan by reason of employment with an FRS agency on or after January 1, 2018. Although Petitioner was previously employed with FRS agencies, he was clearly not eligible to participate in the Investment Plan at that time and was not provided an initial election period.

14. The applicable statutory provisions under section 121.4501(4)(b) provide in relevant part:

1. With respect to employees who become eligible to participate in the investment plan by reason of employment in a regularly established position commencing on or after January 1, 2018 or who did not complete an election window before January 1, 2018, any such employee shall be enrolled in the pension plan at the commencement of employment and may, by the last business day of the eighth month of hire, elect to participate in the pension plan or the investment plan.

3a. Except as provided in subparagraph 4., if the employee fails to make an election to either the pension plan or the investment plan during the 8-month period following the month of hire, the employee is deemed to have elected the investment plan and shall default into the investment plan retroactively to the employee's date of employment.

15. Based on a plain reading of the statute, either of the conditions under Section 121.4501(4)(b)1 apply to Petitioner's circumstances. He first became eligible to participate in the Investment Plan due to his most recent employment in an FRS eligible position, which commenced after January 1, 2018; and he did not complete an election window before January 1, 2018.

16. Petitioner was required to comply with the requirements of Section 121.4501(4)(b)2, Florida Statutes, and make an election between participation in the Investment Plan and the Pension Plan. Such election must be made in writing or electronically and filed with the third-party Administrator within the time prescribed by law.

17. If an employee decides to move to the Pension Plan once properly enrolled in the Investment Plan:

...[A]n employee who chooses to move to the pension plan and who became eligible to participate in the investment plan by reason of employment in a regularly established position with a state employer after June 1, 2002...must transfer from his or her investment plan account, and from other employee moneys as necessary, a sum representing the employee's actuarial accrued liability.

§ 121.4501(f)3., Fla. Stat. (emphasis added).

18. There is no provision of law that would empower SBA to “undo” the statutory Investment Plan default and retroactively enroll Petitioner in the Pension Plan. However, Petitioner has the option, pursuant to Subsection 121.4501(4)(f), Florida Statutes, as cited above, to switch to the Pension Plan while still in an FRS-eligible position. Although there may be a “buy-in” requirement as determined by actuarial calculations provided by the Department of Management Services (“DMS”), the Petitioner is not without remedy.

19. Petitioner’s claim that he was misinformed by his employer, while credible, provides no grounds upon which the relief he seeks may be granted. There is ample evidence to support a conclusion that Petitioner’s current employer contributed to his failure to make an initial election. However, Section 121.021(10), Florida Statutes, is clear that “[e]mployers are not agents of the [Department of Management Services], the [State Board of Administration], or the Division of Retirement, and the department, the state board, and the division are not responsible for erroneous information provided by representatives of employers.” So, while it is safe to conclude his employer contributed in no small part to Petitioner’s misunderstanding with respect to plan election, SBA has no authority to waive any statutory requirements governing such election.

20. Petitioner’s claim of reliance on a statement in the Employment Certification Form is not credible. There is nothing in the statement conclusively showing that it applies to Petitioner’s circumstances. In order to reach such a conclusion, Petitioner would have had to determine whether it applied to his prior service and whether his employer was among those to whom the statement applied. Because he failed to inquire of FRS as to either question, it was not reasonable to rely on the statement.

21. Florida Statutes creating and governing the Florida Retirement System, and Petitioner's rights and responsibilities under them, are clear and Respondent cannot deviate from them. *Balezentis v. Dep't of Mgmt. Servs., Div. of Retirement*, Case No. 04-3263, 2005 WL 517476 (Fla. Div. Admin. Hrgs. March 2, 2005) (noting that agency "is not authorized to depart from the requirements of its organic statute when it exercises its jurisdiction").

22. Respondent lacks the authority to grant Petitioner's request to enroll him in the Pension Plan retroactively, and his request must therefore be denied. Respondent's records indicate that the plan choice administrator did not receive any affirmative election by Petitioner during his choice window ending April 29, 2022, and Respondent is without authority to make that election for him retroactively. Respondent does not have the authority to waive the statutory requirement that employees hired after January 1, 2018, or who did not complete an election window before January 1, 2018, be placed by default into the Investment Plan.

23. Accordingly, Petitioner's Petition must be denied.

RECOMMENDATION

Having considered the law and undisputed facts of record, I recommend that Respondent, State Board of Administration, issue a final order denying the relief requested.

DATED this 13th day of October 2022.



Anne Longman, Esquire
Glenn E. Thomas, Esquire
Presiding Officers
For the State Board of Administration
Lewis, Longman & Walker, P.A.
315 South Calhoun Street, Suite 830
Tallahassee, FL 32301-1872

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: THIS IS NOT A FINAL ORDER

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions must be filed with the Agency Clerk of the State Board of Administration and served on opposing counsel at the addresses shown below. The SBA then will enter a Final Order which will set out the final agency decision in this case.

Filed via electronic delivery with:
Agency Clerk
Office of the General Counsel
Florida State Board of Administration
1801 Hermitage Blvd., Suite 100
Tallahassee, FL 32308
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COPIES FURNISHED via email and U.S. mail to:

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